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IN THE

Supreme Court of the United States

October Term, 1965

No. 844

HOWARD S. MILLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Southern District of California Central Division.

BURTON MARKS,
8447 Wilshire Boulevard,
Beverly Hills, Calif. 90211,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Southern District of California Central Division.

This is a petition of Howard S. Miller for Writ of Certiorari to review the judgment and order made by the Ninth Circuit Court of Appeals affirming the judgment against Howard S. Miller made and entered by the U.S. District Court for the Southern District of California on November 23, 1964.

A copy of the affirming judgment and of the opinion of the Ninth Circuit Court of Appeals, which are as yet unreported, are attached. (Appendices A and B, respectively.) A petition for rehearing was filed and was denied on November 26, 1965. A copy of said order of denial is attached. (Appendix C). A copy of the order Staying Issuance of Mandate pending this Petition is attached. (Appendix D.)

Jurisdiction.

The District Court had jurisdiction in this case under Title 18, §77q(a) and (x) U.S.C.; Title 18, §1341 U.S.C.

The Circuit Court had jurisdiction under Title 28, §1291, and §1294, U.S.C.

This Court has jurisdiction under Title 28, §1254-(1) U.S.C. to review the judgment in question.

Statement of the Case.

On December 5, 1963, a 30-count indictment was filed against Petitioner, Donald McDonald and four other defendants charging them with violations of 15 U.S.C. 77q (a) and (x) (fraud in the sale of securities); and 18 U.S.C. 1341 (mail fraud). Both Petitioner and McDonald were represented by Attorney Gary Fleischman.

On July 6, 1964, before Judge Carr, Petitioner pleaded *nolo contendere* to all 30 counts of the indictment and McDonald similarly pleaded as to Counts I, II and XVIII. The matter was then referred to the probation officers for investigation and report.

On July 28, 1964, the matter was continued to August 4, 1964, for jury trial as to the remaining defendants. On said date the matter of sentencing of Petitioner and McDonald was placed off calendar to await the conclusion of the trial of the other defendants.

On August 19, 1964, the matter actually went to trial before Judge Foley. During the trial Petitioner appeared as a witness for the Government and testified for approximately three days. [R. T. 36.] As a result of the trial, which concluded on October 12, 1964, one

defendant was acquitted. The indictment against another defendant was dismissed upon motion of the Government. The two remaining defendants entered a plea of *nolo contendere* as to Count II of the indictment just prior to submission of the case to the jury and were placed on five years' probation immediately.

On November 20, 1964, Petitioner, together with co-defendant McDonald, and their attorney, Gary Fleischman, appeared before the Honorable Roger Foley, Jr., to be sentenced. The events that transpired on said date are more fully discussed in the "Statement of Facts", *infra.*

Questions Presented.

1. Whether it is the duty of the trial Court at the time of imposition of sentence, upon being advised by an attorney representing two co-defendants, that a potential conflict of interest exists between the co-defendants, to investigate and/or grant a hearing to ascertain the facts of such potential conflict of interest and, if so, is the failure of the Court to fulfill its duty a denial of counsel under the Sixth Amendment to the United States Constitution and a deprivation of due process under the 5th Amendment to the United States Constitution so as to deprive the Court of jurisdiction to proceed in the matter and render all subsequent acts of the Court void.

Statutes and Constitutional Provisions Involved.

The relevant constitutional and statutory provisions are printed in Appendix E. They are:

Title 18, Rule 32 (d) U.S.C., Rules of Criminal Procedure;

Fifth and Sixth Amendment to the United States Constitution.

Statement of Facts.

On November 20, 1964, Petitioner and co-defendant McDonald, Attorney Gary Fleischman, appearing for both, appeared before the Honorable Roger Foley, Jr., to be sentenced on their respective pleas. [R. T. 3.]

Prior to the appearance in open Court, a discussion was apparently held in Chambers between counsel and the Court. When Court resumed, Mr. Fleischman stated that, since the entries of the pleas of *nolo contendere,* a majority, if not all, of the issues of the case had been tried. Due to the facts which were brought out at the trial and due to the change in circumstances, Mr. Fleischman then requested a continuance for the purpose of considering and applying to the Court for an order of the Court withdrawing the pleas of *nolo contendere* theretofore entered by Petitioner and McDonald before Judge Carr. Since Mr. Fleischman did not have the transcript of the trial proceedings before him [R. T. 4], he requested a 60-day continuance for the purpose of doing research and counselling his clients.

As an additional reason for the continuance requested, Mr. Fleischman stated to the Court that he desired to make

> ". . . an examination on my part as to whether or not there perhaps was a conflict of interest which I did not recognize either through my own fault or simply a change of circumstances that has taken place with regard to testimony at the trial. . . ." [R. T. 4.]

At page 5 of the Reporter's Transcript, Mr. Fleischman stated,

> "I noticed that in the office we did not discuss this motion as to both Mr. Miller and Mr. McDonald, but I do feel it should be made as to both of them, since I am representing both of them at the present time and I can't be entirely sure that isn't a conflict of interest in my representing both of these men."

The Government, represented by Asst. U. S. Attorney John Mitchell, opposed the motion as to Petitioner on the grounds that the Court had heard Petitioner testify and that the Court therefore had before it ". . . more than a sufficient record to indicate whether or not the plea was provident or improvident." [R. T. 5.] Paradoxically, the Government indicated that with respect to Mr. McDonald, Judge Carr, who took the plea, should be the Judge to determine whether or not the plea should be withdrawn ". . . after a study of the record in Judge Carr's Court." [R. T. 6.]

Thereafter, the motion of Petitioner was denied [R. T. 7] and he was sentenced to three years concurrently on each count. The same motion as to McDonald was granted (although he too had testified) [R. T. 6], and the matter was continued for 60 days.

Subsequently, co-defendant McDonald moved the Court (Judge Carr) to withdraw his plea of *nolo contendere*; the motion was denied. McDonald was given three years' probation on each count to which he pled *nolo contendere*.

Petitioner duly filed his notice of appeal from the judgment of conviction and bail on appeal was fixed in the sum of $2500.00.

Reasons for Granting the Writ.

A new and novel question of law is presented, to wit, whether it is the duty of the trial Court at the time of imposition of sentence, upon being advised by an attorney representing two co-defendants that a potential conflict of interest exists between the co-defendants to investigate and/or grant a hearing to ascertain the facts of such potential conflict of interest, and if so, is the failure of the Court to fulfill its duty a denial of counsel under the Sixth Amendment to the United States Constitution and a deprivation of due process under the Fifth Amendment to the United States Constitution so as to deprive the Court of jurisdiction to proceed in the matter and render all subsequent acts of the Court void.

ARGUMENT.

1. **Whether It Is the Duty of the Trial Court at the Time of Imposition of Sentence, Upon Being Advised by an Attorney Representing Two Co-Defendants, That a Potential Conflict of Interest Exists Between the Co-Defendants, to Investigate and/or Grant a Hearing to Ascertain the Facts of Such Potential Conflict of Interest and, if so, Is the Failure of the Court to Fulfill Its Duty a Denial of Counsel Under the Sixth Amendment to the United States Constitution, and a Deprivation of Due Process Under the Fifth Amendment of the United States Constitution so as to Deprive the Court of Jurisdiction to Proceed in the Matter and Render All Subsequent Acts of the Court Void.**

A review of the record in this case indicates, *at least* inferentially, that Petitioner's sentencing was postponed until the trial of his co-defendants (except McDonald) was concluded so that his performance as a witness for the Government could be evaluated. It is apparent that the Assistant United States Attorney was dissatisfied with petitioner's performance since he moved the Court to sentence Petitioner immediately without objecting to the continuance for McDonald.

As indicated above, Mr. Fleischman twice asserted, at the time of sentencing, that there might be a conflict of interest if he continued to represent both Petitioner and McDonald. In light of this fact, the request of a 60 day continuance was, it is respectfully submitted, reasonable. The additional period could have been used most advantageously by counsel *and Court* to investigate and ascertain the facts which would have tended to support or repudiate the conflict of interests assertion.

Mr. Fleischman quite properly stated in the lower Court that a motion to withdraw a plea should be made before judgment is imposed. *Federal Rules of Criminal Procedure, 32 (d)*. While a motion after judgment, pursuant to 28 U.S.C. §2255, could be made, these motions are not regarded with favor by the Courts.

The record also discloses that the very thing which Mr. Fleischman sought to avoid in advising the Court that a possible conflict might exist did, in fact, occur. Thus, as indicated by the Circuit Court (Slip op. p. 3, Appendix "B"), at the hearing of the motion for withdrawal of plea and sentencing of McDonald (before Judge Carr), Mr. Fleischman adopted the position that Petitioner's plea was the "wisest course" for Petitioner to have followed. It is respectfully submitted that what Mr. Fleischman in fact meant was that it was the "wisest course" to follow in order to *exculpate* McDonald of complicity in the offenses charged.

In other words, the very situation anticipated by the rule that "a man cannot serve two masters" and made a part of the Canons of Professional Ethics *did arise*. While representing McDonald, Mr. Fleischman was compelled to "point the finger" at Petitioner in an attempt to demonstrate the non-culpability of McDonald.

In its opinion, the Circuit Court stated that "There is not the slightest proof of . . . mistake or inadvertence on his [Petitioner's] part, nor fear or fraud or misrepresentation practiced against him." This statement is perfectly correct, not because these factors were not possibly present, but because Petitioner was never given an opportunity to present any such proof while being represented by counsel who could fairly be said to be representing the exclusive interests of Petitioner.

While this Court has, to Petitioner's knowledge, never before passed on the precise issue presented in this Petition, the following cited decisions of this Court provide most helpful, if not persuasive, authority for the proposition herein advanced by Petitioner. In addition, several circuit courts have rendered decisions germane to this issue.

In *Glasser v. U.S.*, 315 U.S. 60, 62 S. Ct. 457, 86 L. ed. 680 (1942), this Court held that Glasser had been denied his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution. The basis of the decision was that in spite of the fact that a conflict of interests existed between Glasser and a co-defendent, the same attorney was permitted to represent both at the trial. This Court said:

> ". . . Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of the accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> "To determine the precise degree or prejudice sustained by Glasser as a result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial. (Citations omitted.)" (315 U.S. 60, 75-76.)

The *Glasser* rule was adopted in *Craig v. U.S.*, 217 F. 2d 355 (6th Cir., 1954), wherein the Court held that if a conflict of interests exists, the constitutional guarantee of the Sixth Amendment is not satisfied, since counsel, in an attempt to help one co-defendant, would have to injure the other.

People v. Douglas, 61 A.C. 472, 38 Cal. Rptr. 884, 392 P. 2d 964 (1964), may also be of interest to this Court. In *Douglas* (which was the appeal taken after this Court's decision in *Douglas v. Calif.*, 372 U.S. 353, 83 S. Ct. 814, 9 L. ed. 2d 811), the California Supreme Court held, based on *Glasser,* that a defendant has a constitutional right to separate counsel where a conflict of interest exists between a co-defendant and himself.

The *Glasser* case involved a conflict of interest which existed at the trial of the case. It is respectfully submitted that where, as here, a conflict of interest or possible conflict is asserted by counsel at the time of pronouncement of sentence, the failure of the Court to investigate the conflict assertion and/or appoint additional counsel for one of the co-defendants is equally violative of the Constitution. While no decision of this Court was discovered on point, several circuit courts have held that a defendant's guarantee under the Sixth Amendment is violated if he is not represented by counsel at the time of pronouncement of sentence. See *Martin v. U.S.,* 182 F. 2d 255 (5th Cir. 1950); *Wilfong v. Johnston,* 156 F. 2d 507 (9th Cir., 1946).

The rule and *rationale* of these decisions were succinctly stated by the Court in *Martin:*

> "It may be safely said that at this time there is no question of constitutional law any more firmly established than the oft enunciated and applied principle that, in the trial of criminal cases in the Federal Courts, the defendant is entitled to have the guiding hand of counsel at every stage of the proceeding. Thus, in the absence of the intelligent waiver of the right to counsel, it is the duty of the Court to appoint competent counsel for the defendant failing which, the Court loses jurisdiction to proceed. . . .
>
> "The very nature of the proceeding at the time of imposition of sentence makes the presence of defendant's counsel at that time necessary if the constitutional requirement is to be met. There is then a real need for counsel. The advisability of an appeal must then, or shortly, be determined. Then is the opportunity afforded for the presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendant's past record and, in short, to appeal to the equity of the Court in its administration and enforcement of penal laws. Any Judge with trial Court experience must acknowlege that such disclosures frequently result in mitigation, or even suspension of penalty. . . ." (182 F. 2d 225, 227.)

It is respectfully submitted that if a conflict of interest exists at the time of sentencing co-defendants, or if counsel for the co-defendants indicates that such

a conflict might exist, it is the *duty* of the Court to take such action as is necessary to ascertain the facts of the specific conflict, and if the conflict be found to exist, appoint additional counsel for one defendant. Absent this action, it is further submitted, a defendant is deprived of his constitutional guarantee of right to counsel and the judgment pronounced in violation of this right is void. See *Wilfong v. Johnston, supra; Johnson v. Zerbst, infra.*

In *Glasser, supra,* this Court stated with respect to the duty of the trial judge:

> "Upon the trial Judge rests the *duty* of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial Court should protect the right of an accused to have the assistance of counsel. 'This protecting *duty* imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial Court and it would be fitting and appropriate for that determination to appear upon the record' (*Johnson vs. Zerbst,* 304 U.S. 458, 465, 82 L. ed. 1461, 1467, 58 Supreme Court, 1019." (Emphasis added.) (315 U.S. 60, 71.)

The effect of the failure of the trial judge to perform this duty was expressed in *Glasser* in the following manner:

> ". . . The possibility of the inconsistent interests of Glasser and Kretske was brought home to

> the Court but instead of jealously guarding Glasser's rights, the Court may finally be said to be responsible for creating a situation which resulted in the impairment of those rights. . . . Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial Court in the discharge of its duty to preserve the fundamental rights of an accused." (315 U.S. 60, 71-72.)

This Court's philosophy was also enunciated in *Walker v. Johnson,* 312 U.S. 275, 61 S. Ct. 571, 85 L. ed. 830 (1941). In this case involving habeas corpus, this Court expressed a strong preference for holding a hearing and argument in a case in order "to determine the facts of the case."

Finally, in *Johnson v. Zerbst,* 304 U.S. 458, 82 L. ed. 1461 (1938), this Court stated that the effect on the infringement of defendant's right to counsel as guaranteed by the 6th Amendment was as follows:

> "If the accused, however, is not represented by Counsel. . . . The Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. *A Court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the Court—As the Sixth Amendment requires.* . . . If this requirement of the Sixth Amendment is not complied with, the Court no longer has jurisdiction to proceed. *The judgment of conviction pronounced by a Court without jurisdiction is void.* . . . (Emphasis added.) (304 U.S. 458, 468.)

Conclusion.

Petitioner respectfully submits that a review of the record will, in this case, indicate that this Petition for Writ of Certiorari should be granted and that the judgment of the Circuit Court affirming the judgment of the District Court should be reversed and the matter remanded to the trial court for further proceedings.

Respectfully submitted,

BURTON MARKS,
Attorney for Petitioner.

APPENDIX A.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Howard S. Miller, Appellant, vs. United States of America, No. 19,934.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 19, 1965.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Howard S. Miller, Appellant, vs. United States of America, Appellee. No. 19,934.

[Oct. 19, 1965]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Hamlin and Merrill, Circuit Judges. Judges.

Barnes, Circuit Judge:

Appellant and five codefendants were charged in a thirty county indictment with mail fraud (18 U.S.C. § 1341) and fraud in sale of securities (15 U.S.C. § 77q(a) and 77x). Appellant originally pled not guilty. After one change of retained counsel, appellant and another defendant (McDonald) requested leave to withdraw their pleas of not guilty, and enter new pleas. Miller pleaded nolo contendere to counts one through thirty; McDonald to counts one, two and eighteen. The case went to trial as to all remaining defendants. The trial lasted two months, during which appellant was on the stand testifying for several days. One defendant was acquitted and two defendants entered pleas of nolo contendere to one count, and one defendant pleaded guilty to a misdemeanor.

At time for sentencing on the nolo pleas, counsel for appellant and McDonald, acting for both, informally raised a question as to McDonald's plea of nolo con-

tendere. At the time for sentencing, counsel for both defendants requested a continuance of sixty days on behalf of both defendants, primarily to determine if defendant McDonald had voluntarily withdrawn his plea of not guilty and voluntarily entered his nolo contendere plea. No representation was made by counsel as to any lack of understanding by appellant of his action, nor any representation that there was any detriment to Miller in counsel jointly representing him and his codefendant, but only a possible undetermined conflict of interest. The trial judge denied the motion for delay as to appellant and granted it as to codefendant McDonald. He then sentenced the appellant.

A defendant has no legal right to withdraw his plea of guilty. *United States v. Lias,* 173 F.2d 685 (10th Cir. 1949). There is not the slightest proof of appellant's nonparticipation in the crime charged, nor any mistake or inadvertence on his part, nor fear or fraud or misrepresentation practiced against him. The trial judge had personally observed the defendant at the trial. He had heard the testimony appellant himself gave, and that given by others, which cast appellant in the role of principal:—"the ring leader," to quote the trial judge. The judge listened patiently to a long statement from the defendant in allocution, in which the defendant failed to deny his acts; expressed no regrets for what he had done; but blamed his lawyers, the Securities Exchange Commission, the State Corporations Commissioner, the prosecuting attorneys, his codefendants—in fact, everybody but himself. The trial judge obviously did not "buy" this approach. (Rep'trs Tr. 37-39.)

The granting or denial of a motion for a continuance is purely within the discretion, judicially exercised, of

the trial judge. On appeal, an abuse of that discretion must be shown before that discretion will be disturbed. There is here a total lack of any showing of abuse. In fact, quite the opposite appears. *Luomola v. United States,* 301 F.2d 138 (9th Cir. 1962), *cert. den.* 373 U.S. 924 (1963).

The notice of appeal was filed as a "protective measure" so that defendant's right to appeal would not lapse "prior to the hearing of any motion to set aside the plea of guilty." (Clk's Tr. 47.) In support of motion for bail made below, counsel for appellant stated:

> "[A]ffiant deposes that he is in the process of preparing a motion before the Honorable Charles Carr to have heard an application to set aside the plea of guilty heretofore entered by defendant. Said motion will be filled within the next few days." (Clk's Tr. 49.)

Bail was fixed, and the defendant released. No motion was ever made on behalf of Miller. (Supp. Clk's Tr.)

The defendant McDonald *was* granted, before his sentence, an extension of time within which to file a motion to withdraw his plea of nolo contendere. This *was* filed, and in support of McDonald's motion a statement was made by counsel representing both defendant McDonald and Miller at the trial which said:

> "Finally, McDonald decided he had no alternative but to enter a plea of Nolo Contendere. I felt at that time and still do that defendant Miller's plea

was indeed the wisest course for him because of his inextricable involvement in this complex offense." (Supp. Clk's Tr.)

This appeal has no foundation or merit in law or fact. It is a travesty on the administration of justice to permit it, and to enable newly employed counsel to gain delay for an unrepentant defendant before serving his sentence. It is in our opinion a frivolous appeal.

Affirmed.

APPENDIX C.

Order Denying Petition for Rehearing and Rehearing En Banc.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Friday, November 26, 1965.

Before: Barnes, Hamlin and Merrill, Circuit Judges.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed November 17, 1965, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, and suggestion for a rehearing en banc is rejected.

APPENDIX D.

Order Staying Issuance of Mandate.

United States Court of Appeals for the Ninth Circuit.

Howard S. Miller, Appellant, vs. United States of America, Appellee. No. 19,934.

Upon application of Burton Marks, Esq. counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before December 24, 1965. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Stanley N. Barnes
United States Circuit Judge.

Dated: San Francisco, Calif.
We will prepare a certiorari record
when directed to do so.

APPENDIX E.

Title 18, Rule 32(d) U.S.C.

Rule 32. Sentence and Judgment

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

United States Constitution, Fifth Amendment.

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.